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STATE OF MONTANA

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May 19, 2014

Sandy Welch
PO Box 1596
Helena, MT 59624

COPP-2014-AO-009
Re: A Particular Definition of Contribution

Dear Ms. Welch:

I write in response to your inquiry of January 8, 2014 regarding certain reporting and disclosure issues, including use of "firewalls" to allow certain campaign relationships without creating coordination. As we later discussed, this request also triggers a review of a certain definition of contribution.

I further explained that a response to this question needed to be made in the form of an advisory opinion as that gave some precedential value to the response. More importantly, it meant that the response will be made available to the public and subject to public review and application. I further explained that this Office would invoke the pre-issuance public comment step authorized by administrative rule [44.10.201(1)(b) ARM] in regard to Advisory Opinions. You agreed with this approach.

On February 7, 2014 this Office issued a preliminary Advisory Opinion. That preliminary Advisory Opinion noticed a public hearing, conducted in Helena, Montana on March 4, 2014. Present as a panel to take and hear comments on the preliminary Advisory Opinion were Jonathan Motl, Jaime MacNaughton and Mary Baker.[1] The comments presented, orally and in writing, were considered and the final Advisory Opinion is now issued as set out below.

[1] Commissioner of Political Practices, Legal Counsel to COPP and Program Supervisor COPP, respectively.

The Issue Posed on January 8, 2014 for Advisory Opinion Consideration

> Given the recent determinations regarding coordination I [Ms. Welch] am requesting an advisory opinion regarding organizations such as party committees or political committees that work to support their candidates of choice. Specifically there are a few organizations of which I am aware that raise money, train candidates and provide ongoing support and advice, and mail pieces or make other expenditures in support or opposition. These organizations set up "firewalls" inside the organization to prevent coordination either by having different staff members, contractors or subcommittees work with candidates and another make expenditures. Is this enough to avoid coordination? What would the firewall have to look like? What documentation of activities would be required to demonstrate the independence between these arms?

ADVISORY OPINION

The advisory opinion is placed, made and discussed, below.

I. Reach of This Advisory Opinion

This advisory opinion modifies the contribution related authority set out in the Decision entitled *Montana Republican Party (Deschamps) v. Bullock,* COPP-2012-CFP-12 (May 15, 2012, Deputy Commissioner Dufrechou). The advisory opinion does not reopen or affect the outcome of *Deschamps v. Bullock*, nor will it apply to affect other comparable instance in any other past campaign to which the Decision may have applied as authority. Stated another way, the reporting and disclosure duties inherent in this advisory opinion will not be retroactive, but will be prospective from the dates set out in this Decision. The advisory opinion having been adopted will hereafter define the manner in which the Commissioner will enforce applicable portions of the Montana Campaign Practice Act during the 2014 campaign cycle.

II. The Advisory Opinion

As a foundational matter, it is the opinion of the Commissioner that value of paid personal services provided to a candidate's campaign and paid for by a

political committee is a contribution under Montana law that is subject to reporting, disclosure and, as applicable, contribution limitation. The following is the formal advisory opinion:

> Title 13 of the Montana Code Annotated requires that the value of any personal services rendered by an individual paid by a political committee, including a party committee, to a campaign, including a candidate campaign, constitutes an in-kind contribution to the campaign subject to applicable reporting, disclosure and limits. However, a political committee's provision of, or payment for, personal services providing internal legal and accounting services to a political committee or candidate committee for non-election purposes is not such an in-kind contribution. Further, a provision of in-kind paid personal services by a political party committee to a candidate, while still a contribution for reporting and disclosure purposes, does not count toward the monetary limits placed on contributions by political party committees.

This advisory opinion, as stated above, applies as an interpretation of §13-1-101(7)(a)(iii) MCA and §13-37-216(5) MCA. The dates of effect of this advisory opinion are: Effective immediately (date of signature) for political committees other than political party committees; and, for political party committees, effective the date of adoption of the administrative regulation changes defined at page 8 of this Advisory Opinion.

Introduction to Discussion

In *Deschamps v. Bullock,* Deputy Commissioner Dufrechou applied Montana's basic rules of statutory construction to make a certain analysis of Montana law. That Dufrechou analysis is modified by this Decision. There are two basic reasons for making this modification. First, in terms of statutory construction the Dufrechou analysis failed to utilize the entirety of §1-2-101 MCA, the relevant statute defining construction. That statute ends with the direction that "[w]here there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." Deputy Commissioner Dufrechou's approach to construction focuses on one particular (one sentence within §13-1-101(7)(a)(iii) MCA) and ignores conflicting contribution language in other sentences set out in Title 13. Those conflicting sentences include the overall definition of contribution ("anything of value") and the definition of volunteer services. A statutory construction giving effect

to all provisions supports the modified position in the advisory opinion set out above.

Second, Deputy Commissioner Dufrechou's interpretation does not attempt to reconcile and create consistency in this Office's previous positions on this issue. Deputy Commissioner Defrechou's hesitancy to address this issue is understandable. The *Deschamps v. Bullock* Decision frankly states that "[i]t is difficult if not impossible to reconcile some of the various past positions with the statutory language, but none of the past positions taken by the COPP are binding on determination of the present issue." Deputy Commissioner Defrechou's Decision may have been prudent, but it did not eliminate the need to reconcile the "various past positions." When those positions are reconciled, as this advisory opinion does, the Commissioner is led to the modified advisory opinion position set out above.

Discussion

The Commissioner's office has a 20 year-plus history of interpreting §13-1-101(7)(a)(iii) MCA to require in-kind contribution reporting and disclosure of the value of election use of paid staff by any entity involved in a ballot issue campaign. Commissioner Argenbright issued a Decision in *Daubert v. Montanans for Clean Water*, February 27, 1997 that so applied §13-1-101(7)(a)(iii) MCA.[2] *Montanans for Clean Water* determined that: "[f]urther, Respondent [Orvis Company Inc.[3]] under-estimated the value of the in-kind contribution. Orvis' staff time to draft the letter was not included in the value of the in-kind contribution." *Id.* at p. 6. In June of 2000 Commissioner Vaughey applied §13-1-101(6)(a)(iii) MCA to 7 Montana business groups so as to require "...full disclosure of the value of such [paid personal staff] services, the value must include total compensation paid, including benefits, travel expenses, bonuses or other supplemental payments." *Heffernan v. Montana Chamber of Commerce*, June 2000.

The COPP has since routinely applied §13-1-101(7)(a)(iii) MCA to resolve complaints against ballot committees involving claims of failure to report in-

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[2] The correct citation at that time was §13-1-101(6)(a)(iii) MCA. The COPP earlier applied §13-1-101(6)(a)(iii) MCA to require paid staff time be reported as an in-kind contribution by ballot committees in Decisions applying to the 1988 bottle bill campaign. The *Montanans for Clean Water* Decision is the first such Decision posted to the Commissioner's website and therefore available for public review.

[3] For the purpose of the Decision, Orvis Company Inc. was a "ballot issue committee supporting Initiative 122." *Id.* p. 1.

kind staff costs spent for or against a ballot issue. See *Harrington v. Cap the Rate,* July 3, 2012 (Commissioner Murry). *Cap the Rate* involved complaints against 7 Montana non-profit corporations, including AARP Montana, that expended funds and staff time promoting passage of Initiative 164 on the 2010 ballot.[4]

There is thus, as set out above, a long uninterrupted history of the COPP applying §13-1-101(7)(a)(iii) MCA to require in-kind contribution reporting of staff time paid by political committees in ballot issue campaigns. Under law that interpretation must also apply to candidate campaigns as there is only one Title 13 and only one statute numbered §13-1-101(7)(a)(iii) MCA. Section 13-1-101(7)(a)(iii) MCA is therefore law that applies equally to ballot committees, political committees and candidate committees. Applying §13-1-101(7)(a)(iii) MCA to require reporting and disclosure of the election use value of paid staff by any entity involved in a ballot issue campaign means that the law must be applied in the same way to paid staff involvement of a political party committee in a candidate campaign.

The above analysis being made, the Commissioner recognizes that multiple past Commissioners have adopted a certain, differing practical approach to valuation of paid staff when dealing with political party committees. This Commissioner has reviewed a February 29, 1996 letter from former COPP legal counsel Kimberly Chladek (the letter apparently reviewed by Deputy Commissioner Dufrechou) addressed to representatives of political party committees or candidates. The Chladek letter, in contrast to the ballot committee Decisions, states that in-kind staff value provided to a candidate by a political party committee was NOT treated as a contribution to a candidate. The letter cites to a decade long "tradition" but does not list the law or legal path that allowed an interpretation that paid staff value provided by a political party committee to a candidate was not a contribution.[5] In fact, this "differing approach" has not heretofore been explained by analysis in law.[6]

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[4] A corporation, whether profit or non-profit, becomes a political committee upon engaging in expenditures related to a political campaign.

[5] The Commissioner notes that that the 1996 Chladek letter was issued under the authority of "Ed Argenbright, Commissioner." Commissioner Argenbright is the same Commissioner who one year later signed the *Daubert v. Montanans for Clean Water* Decision determining a contribution and requiring disclosure of in-kind staff value provided by political committees to a ballot committee.

[6] Indeed, this differing approach was made internally by "tradition," and memorialized solely by letter and memo. None of this differing approach was made public or rose to any level of actual authority until the *Deschamps v. Bullock* Decision was made and published.

As the first step in such a legal analysis, a "differing approach" afforded provision of paid staff services provided to candidates by political parties committees cannot be explained by simple reference to political committee status. This is so because a political party committee has no special status as a Montana "political committee" under Montana law. To be specific, a political party committee is a political committee that is afforded the same "independent committee" legal status as a PAC, See 44.10.327(2)(b) ARM.[7] Thus, the "differing approach" used in *Deschamps v. Bullock* is not appropriate if based on political committee status, as it is applied an in-kind paid staff exception to the generic words "political committee" contained within the general definition of §13-1-101(7)(a)(iii) MCA. Such a paid staff exception to "political committee" contributions is far too broad and is not consistent with the far narrower "tradition" that past Commissioners limited to political party committees in particular, rather than political committees in general. Further, such a generic political committee paid staff exception clashes directly with the decades long history of Commissioners applying §13-1-101(7)(a)(iii) MCA to require contribution disclosure of paid staff providing services in ballot issue campaigns. This analysis has no merit.

Second, finding such a paid staff exception to generic political committee contributions under §13-1-101(7)(a)(iii) MCA is not consistent with statutory construction. An interpretation giving meaning to all words should instead limit the paid personal services not included in "contribution" [the paid staff exception] solely to legal or accounting services serving internal non-election purposes. This is the interpretation made by the Federal Election Commission (FEC) when it dealt with a comparable paid staff exception on the federal level. Much of Montana's Title 13 statutory language, including §13-1-101(7)(a)(iii), was borrowed from comparable federal law. The FEC, faced with the same issue raised in *Deschamps v. Bullock,* interpreted the contribution language to mean that contribution included all paid personal services except for the internal, non-electioneering legal and accounting services provided to the political or candidate committee.[8]

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[7] The term "political committee" is defined by 44.10.327 ARM to include all committees recognized by the COPP, including a political party committee.

[8] The comparable section of federal law [2 USC §431(8)(ii)] was amended to remove the language at issue in this Matter. Even before the amendment the FEC had, by advisory opinion, limited the language to apply to internal legal/accounting work. *See* FEC AO 1975-27, Federal Register, Vol. 41, No. 204, Oct. 20, 1976.

With the above analysis in mind, the Commissioner determines that there is no §13-1-101(7)(a)(iii) MCA paid staff exception to contribution applicable to the value of in-kind services provided to a candidate by a political party committee. This, of course, was the basis for the Decision in *Deschamps v. Bullock*. That basis is specifically rejected and replaced by this Decision.

The Commissioner next considers whether there is another more appropriate way to separately treat such in-kind value. This consideration starts by affording weight to the deference provided political party committees under the "tradition" set by prior Commissioners. Deference to political party committees appears regularly in Montana's campaign practice laws. Political parties are generally afforded separate statutory treatment (Title 13, Chapter 38) under Montana law and are specifically afforded separate and larger campaign contribution limits (13-37-216 MCA), while being excepted from the aggregate PAC limits placed on legislative candidates (§13-37-218 MCA).

The deference to political parties provided by Commissioner "tradition" and Montana statutes is likely rooted in common sense, respecting past conduct.[9] Several recent US Supreme Court Decisions recast this deference in the form of constitutional requirements. For example, a 2006 US Supreme Court Decision declared certain of Vermont's campaign practice laws unconstitutional.[10] The Decision was a plurality opinion (meaning that no one opinion set out majority language) but the syllabus states that treating political parties the same as individuals "threatens harm to a particularly important political right, the right to associate in a political party." *Id.*, 230 at p. 235. The Decision goes on to show particular concern for activities promoting the involvement of people in campaigns. *Id.*

With the above in mind, the Commissioner determines that there is a basis, rooted in Montana tradition, as translated into constitutionally protected association rights, to provide deference to political party in-kind contributions made in the form of paid personal services. The statutory language, however, that needs to be examined in light of that deference is that of contribution

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[9] At the public hearing on the proposed Advisory Opinion Mike Meloy, the attorney for the Montana Democratic Party, and David Hunter, representing the Democratic Party Coordinating Committee, argued that placement of staff by the Democratic Party in a particular campaign served the Party's interest (through communication with members of the Democratic Party) as much as the candidate's interest. The Republican Party did not have a representative at the public hearing, but Senator Dee Brown (R. SD 2) endorsed the comments of Mr. Meloy. These comments are consistent with the associational interests articulated in the Decision referenced in FN 10.

[10] *Randall v. Sorrell,* 548 U. S. 230 (2006)

limits imposed on political party committees by §13-37-216 MCA. The Commissioner understands that only courts, not administrative agencies, have jurisdiction to decide issues requiring determinations of constitutionality. *Brisendine v. Dep't of Commerce*, 253 Mont. 361, 366, 833 P. 2d 1019, 1021-22 (1992). Agencies, however, are required to construe statutes or regulations in a manner that affords recognition of constitutional issues so as to interpret law in a manner that would render its use constitutional. *City of Great Falls v. Morris*, 2006 MT 93, ¶19, 332 Mont. 85, 134 P. 3d 692. Given the 20 year history of Commissioner deference provided political party in-kind personal services, translated into constitutional deference, this Commissioner will not construe in-kind personal services provided by political parties to candidates during the 2014 election cycle to be included within the contribution limits imposed on political parties by §13-37-216 MCA. While these in-kind personal services may be provided without restriction on amount, the same are still contributions that must be reported and disclosed by the political party and the candidate, under the timeline set out below.

Date and Method Of Application of Advisory Opinion

This Advisory Opinion is effective immediately as to all political committees other than political party committees. This immediate application date makes clear that the precedent of the *Daubert v. Montanans for Clean Water*, February 27, 1997, *Heffernan v. Montana Chamber of Commerce*, June 2000 and Decisions following applies to require reporting and disclosure of in-kind paid personal staff services provided to candidate campaigns.[11]

This Advisory Opinion will apply in-kind staff value contribution reporting requirements to political party committees and candidates upon the date of adoption of appropriate administrative regulations.[12] Until the date of adoption of these regulations the *Deschamps v. Bullock* Decision, as narrowed by this Advisory Opinion to apply to political party committees, will remain as authority. Because *Deschamps v. Bullock* remains as authority for political party committees, this means that political party committees may continue with the "tradition" of not reporting as contributions the value of paid staff services provided by the political party to candidates. Upon adoption of administrative rules contribution reporting of the value of these services will be required.

III. The Advisory Opinion as applied to Ms. Welch

Upon signature, the above advisory opinion will apply to Ms. Welch's activities in the following manner. This advisory opinion will apply to all political committees, candidates and individuals.

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[11] Contribution limits and the prohibition of corporate contributions to a candidate also apply.
[12] The Commissioner will prepare, notice and adopt these regulations under the procedure defined in the Montana Administrative Procedure Act.

A. Can a PAC Pay for In-Kind Paid Personal Services to a Candidate?

Yes, a political committee can contribute to a candidate's campaign by paying for personal services. Ms. Welch represents that she may provide paid personal services to a candidate with Montana Business Advocates for Sensible Elections (Montana BASE) paying Ms. Welch for some of that work. Ms. Welch's work, on behalf of the candidate, must be reported by Montana BASE as an in-kind contribution to the candidate at the amount Ms. Welch is paid by Montana BASE for that work. The candidate, in turn, must report the receipt of that in-kind contribution.

The above discussion relating to political party committees does not apply to Montana BASE. Montana BASE is not a political party committee and is therefore subject to reporting, disclosure, and contribution limits. Contribution limits are aggregate, with valuation including cash and in-kind. Any paid personal services provided by Montana BASE specifically to the candidate (including training, advice or other services) must be valued and reported as an in-kind contribution and added to any cash contribution made by Montana BASE to the candidate. Montana BASE's contribution (and therefore its payment to Ms. Welch for work with a candidate) cannot exceed the candidate contribution limit afforded a political committee.

The candidate must likewise report and disclose the Montana BASE contribution amount. A candidate cannot accept a contribution is excess of limits. Because Montana BASE is a PAC, the amount contributed also counts toward the aggregate PAC limit.

B. Can Ms. Welch Also Be Hired by the Candidate?

Yes, Ms. Welch can be hired and paid by a candidate's campaign, even though she is also paid to work on the candidate's campaign by Montana BASE. A political committee, subject to contribution limits, may make its contribution in the form of cash or in-kind services.

Ms. Welch specifies that she has established a consulting business that may be hired by party committees, political committees and/or candidate committees. While it is not set forth in Ms. Welch's statement of facts, the Commissioner is aware that the candidates and campaigns Ms. Welch intends to work on are those involving Montana legislative districts. At this time most Montana legislative campaigns do not involve full-time paid staff. It makes sense, and is consistent with Montana's culture of citizen campaigning, that

Ms. Welch's business would have multiple candidate clients, given the limited resources that each candidate is likely to have to pay for her services.

There are limits on what a political committee can contribute to a candidate, thereby limiting how much staff time a political committee can hire from Ms. Welch and provide to a candidate. There is no limit on the amount of money that a candidate's campaign can pay to Ms. Welch and therefore no limit on the amount of paid time that Ms. Welch can spend on a candidate campaign, when that time is paid by the candidate.

Ms. Welch should keep in mind the potential coordination issues discussed below. Montana Base's arms-length payment of $180 to Ms. Welch for services provided to a candidate does not, by itself, create coordination with the Candidate for whom Ms. Welch is working. There has to be something more showing that Montana Base is coordinating actions or activity, through Ms. Welch or otherwise, with the candidate.

C. Can Ms. Welch Volunteer her Time to a Candidate?

Yes, Ms. Welch may volunteer her time to a candidate. There are only 24 hours in a day and Ms. Welch has the same 24 hours as any other human being. Ms. Welch is in business and will likely sell most of her time to clients. However, Ms. Welch may choose to allocate her remaining unpaid time, just as any other person may. This volunteer time issue has been defined in several prior Decisions by Commissioners.

D. Can Montana Base Engage in Independent Expenditures?

Yes, under Montana law Montana BASE can engage in independent expenditures supporting or opposing a candidate so long as it remains at arms-length independence with the candidate. The fact of Montana BASE's arms-length contribution (whether cash or in-kind) to a candidate does not by itself limit Montana BASE's ability to make independent expenditures relative to that candidate's campaign. An independent expenditure must be timely reported and disclosed, but is not subject to limits. Please see the coordination discussion, below.

E. Firewalls and Coordination, Should Coordination be a Concern?

Yes, coordination should be cause for concern. Campaigns involve opposing candidates and opposing political camps. Ms. Welch represents that Montana BASE plans to make contributions and engage in independent

expenditures. Complaints over campaign practices are common and Montana BASE would be wise to carefully consider its actions in that coordination, if it exists, will turn an independent expenditure into an in-kind contribution. Because Montana BASE is subject to contribution limits it is likely that any such conversion will result in a contribution in excess of limits. An excess contribution is an illegal contribution and creates major problems for the candidate and Montana BASE.

Ms. Welch asked about firewalls. It would be prudent for Montana BASE to erect such a firewall in regard to Ms. Welch. Specifically, a field contractor like Ms. Welch who may be working for the candidate and also be paid by the PAC (see above discussion) should not be involved in any aspect of the independent expenditure activity, including the planning of that activity. Please review the several recent Decisions on coordination. A circumstance of defined, but firewalled paid personal services from the same person (Ms. Welch) and the circumstance of actions taken in the same time period (a necessity in that elections are date certain) does not by itself create coordination. So long as there is genuine separation between the candidate and Montana BASE's independent expenditure activity then coordination will not lie.

It is noted that the Commissioner has issued several recent Decisions finding sufficient facts to show coordination. The fact of multiple sufficiency findings does not mean that coordination has somehow been made easier to find. To the contrary, the recent Decisions are based on extensive and blatant intermingling of the third party (corporate) and candidate campaign identity. The fact that Montana BASE is considering and asking about Firewalls demonstrates a respect for law that is lacking in the campaigns addressed by recent Decisions. A candidate or third party wishing to avoid coordination can do so. In fact, coordination is the result of an opposite action as it is created by deliberate steps constituting a shared act between the candidate and the third party.

Limitations on Advisory Opinion

This letter is an advisory opinion based on the specific written facts and questions as presented above. This advisory opinion may be superseded, amended, or overruled by subsequent opinions or decisions of the Commissioner of Political Practices or changes in applicable statutes or rules. This advisory opinion is not a waiver of any power or authority the Commissioner of Political Practices has to investigate and prosecute alleged

violations of the Montana laws and rules over which the Commissioner has jurisdiction, including alleged violations involving all or some of the matters discussed above.

The advisory opinion takes effect upon the dates set out above. *Deschamps v. Bullock* is hereby modified in the manner set out above. The policy of the Advisory Opinion set out in this Letter is declared as the applicable policy and precedent of the COPP.

Sincerely,

Jonathan R. Motl
Commissioner of Political Practices